Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

ALL COMMUNITY WALK IN CLINIC, MOHAMMED A. GAZI, AND ESTATE OF RAEES I. GAZI, DECEASED, MOHAMMED A. GAZI, PERSONAL REPRESENTATIVE,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the United States Tax Court have jurisdiction to vacate its decisions on equitable grounds, such as fraud, after they become final?

2. If so, should the Tax Court decisions in this case be vacated on the ground that a fraud on the court was committed?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, All Community Walk In Clinic has no parent company. No publicly held company owns 10% or more of All Community Walk In Clinic.

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All Community Walk In Clinic, Mohammed A. Gazi, and the Estate of Rafeeq I. Gazi, Deceased, Mohammed A. Gazi, Personal Representative (collectively "Petitioners"), petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced in the Appendix ("App.") at App. 1a-3a. The opinion of the United States Tax Court is unofficially reported at 90 T.C.M. (CCH) 127 (2005), and is reproduced at App. 4a-23a. The orders of the United States Tax Court are reproduced at App. 24a-25a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit were entered on May 10, 2007. This petition is filed within 90 days of that judgment pursuant to Sup.Ct.R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND TAX COURT RULE INVOLVED

26 U.S.C. § 7481(a)(2) provides, in pertinent part, that "the decision of the Tax Court shall become final . . . [u]pon the expiration of the time allowed for filing a notice of appeal."

26 U.S.C. § 7483 provides, in pertinent part, that "[r]eview of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered."

Tax Court Rule 162 provides that "[a]ny motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the [Tax] Court shall otherwise permit."

STATEMENT OF THE CASE

1. Statement of Facts.

On April 29, 1998, Petitioners, Mohammed A. Gazi, Dr. Raees I. Gazi ("the Gazis"), and Dr. Gazi's wholly-owned corporation, All Community Walk In Clinic ("All Community"), filed petitions in the United States Tax Court challenging notices of deficiency issued to them by Respondent, the Commissioner of Internal Revenue ("the Commissioner"). (App. 6a.) At that time, Petitioners were represented by Jay E. Kauffman, Esquire, an attorney and accountant in Seminole, Florida. The petitions addressed seven tax years, from 1983 through and including 1989, and raised numerous complex issues that required the analysis of hundreds of documents. Since the commencement of the Tax Court cases, Petitioners have consistently maintained that no taxes or penalties are owed and the adjustments in the deficiency notices are incorrect.

The original trial date in this case was April 26, 1999, in Tampa, Florida. (App. 6a.) On March 22, 1999, the trial was continued pursuant to an agreement by the parties, with the requirement that they file periodic status reports. (App. 6a-7a.) The Commissioner's counsel, Monica Miller, Esquire, filed reports in May, August, and September, 1999, advising the Tax Court that Petitioners and a revenue agent were meeting regularly to discuss settlement of the case. Mr. Kauffman did not file any reports. (App. 7a.)

After the cases were scheduled for trial to begin on October 28, 2002, in Tampa, Mr. Kauffman filed motions to continue the trial and to transfer the cases to Baltimore, Maryland. (App. 7a.) Mr. Kauffman advised the Tax Court that the Gazis had relocated to Baltimore and had been unable to confer with counsel since the move. The Tax Court rescheduled trial to take place in Baltimore on May 19, 2003. (*Id.*)

Thereafter, Dr. Gazi became extremely ill and suffered an acute and near fatal episode of hypotension (low blood pressure) toward the end of February 2003. She was diagnosed with carcinoid syndrome while hospitalized, and died on July 23, 2003. (App. 5a, 12a.)

By letter dated April 10, 2003, Ms. Miller sent Mr. Kauffman the revenue agent's report and computations,

along with a settlement proposal for both cases. In her letter, Ms. Miller stated that the settlement proposal was a final proposal that would be withdrawn if not accepted on or before May 2, 2003. (App. 11a.) Three weeks later, Mr. Kauffman called Ms. Miller and informed her that he had been unable to contact Petitioners. (App. 12a.)

Following that phone call, on May 2, 2003, Mr. Gazi received the April 10th settlement proposal and learned that trial had been scheduled for May 19, 2003. This was the first the Gazis had heard about these cases since September 2001. Mr. Gazi immediately called Ms. Miller, explaining that he had just received the proposal and that his wife was very sick. (App. 12a.) Ms. Miller told him that he should call his attorney and that the settlement offer was extended to May 5, 2003. (*Id.*)

Mr. Gazi contacted Mr. Kauffman, told him about his wife's condition, and stated that they would not settle but wanted to go to trial. (App. 12a.) Mr. Kauffman told Mr. Gazi that he needed to find local counsel in Baltimore. (*Id.*) On May 6, 2003, Mr. Gazi met with Mark E. Kell, Esquire, a Baltimore tax attorney, who advised that Mr. Gazi should seek a continuance on the grounds that Petitioners had submitted their financial information to the Commissioner in 2001 and the Commissioner did not respond until 19 months later, approximately four weeks before trial; that the Commissioner gave Petitioners only two weeks to accept the settlement proposal; that Dr. Gazi, the most important party and witness, had a potentially fatal cancer and was not fit to participate in a trial until after her radiation and chemotherapy concluded; and that since the Gazis moved to Maryland, they needed local counsel, who would not enter his appearance unless a continuance was granted. Shortly after their meeting, Mr. Gazi paid Mr. Kell an initial retainer of $500. (App. 13a.)

Following this meeting, Mr. Gazi spoke to Ms. Miller and informed her that Mr. Kell was representing Petitioners and that Mr. Kauffman was not. (App. 13a.) Mr. Gazi believed that Mr. Kauffman would stay involved for the limited purpose of assisting with a motion for continuance and providing information to Mr. Kell.

In a supplemental status report that Ms. Miller prepared for the Tax Court on May 12, 2003, Ms. Miller stated that

"petitioners' former counsel is no longer authorized to act on behalf of petitioners." (App. 8a.) Ms. Miller recounted in that report a telephone conversation she had with Mr. Kell in which he told her that he believed he would be entering his appearance and requesting a continuance, and that he would send Ms. Miller a facsimile of his entry of appearance when it was to be filed so they could have a meaningful discussion of the cases. (*Id.*) In two motions she filed with the status report the following day, May 13, 2003, Ms. Miller reiterated that Petitioners' former counsel, Mr. Kauffman, no longer had authority to represent Petitioners. (App. 13a.)

On May 14, 2003, Mr. Gazi faxed to Ms. Miller and Mr. Kauffman copies of physicians' letters concerning Dr. Gazi's medical condition and her inability to participate in a trial at that time. (App. 13a.) Ms. Miller and Mr. Kauffman subsequently had a telephone conference with the Tax Court that day in which Mr. Kauffman requested a continuance and permission to withdraw as counsel. (App. 9a.) The Tax Court responded that formal motions should be filed and that the parties should be prepared to argue the motions on the record at the May 19, 2003, calendar call. (*Id.*) Mr. Kauffman spoke with Mr. Gazi later that day and apprised him of the conference call with the Tax Court. (App. 13a.)

The next day, May 15, 2003, Mr. Gazi faxed a letter to Mr. Kell and Mr. Kauffman in which he stated again that Petitioners wanted to go to trial. (App. 14a.) Later that day, Mr. Kauffman faxed to Ms. Miller motions to withdraw as counsel and to continue the cases, and included with the motions the physicians' letters that Mr. Gazi had sent each of them the day before. (*Id.*) The motions stated that "petitioners owed Mr. Kauffman over $20,000, that on May 5, 2003, Mr. Kell had informed Mr. Kauffman that petitioners were retaining him as counsel, and that on May 14, 2003, Mr. Kaufman spoke with Mr. Gazi 'who confirmed that Mr. Kell had been retained. During the conversation irreconcilable differences arose between [Mr. Gazi] and Kauffman making it impossible for Kauffman to continue his representation." (*Id.*) The motions also repeated the statement made in Ms. Miller's status report that Mr. Kauffman "is no longer authorized to act on behalf of petitioners." (*Id.*)

Mr. Kauffman called Mr. Kell to advise that the motions

had been filed but that the Tax Court had not yet ruled on them. Mr. Kell relayed this information to Mr. Gazi. Although Mr. Kauffman served the Commissioner with copies of the motions confirming his lack of authority to represent Petitioners, Mr. Kauffman, as the Tax Court stated, "filed no motion to continue these cases or to withdraw Mr. Kauffman as counsel." (App. 9a.) As a result, the Tax Court was unaware of the attorneys' fees that the Gazis owed and the "irreconcilable differences" between Petitioners and Mr. Kauffman that arose during Mr. Kauffman's May 14th phone call with Mr. Gazi. Nor did the Tax Court know, as Ms. Miller did, that one of the Petitioners, Dr. Gazi, was too ill to participate in the trial.

As the Tax Court noted, Mr. Kauffman testified that he had a telephone call with Mr. Gazi on the evening of May 15th in which Mr. Gazi purportedly authorized Mr. Kauffman to settle the cases (App. 14a), but Mr. Kauffman's phone records showed that the latest communication he had with Mr. Gazi that day was at 5:05 p.m., when he faxed to Mr. Gazi the motion to withdraw Mr. Kauffman's appearance as Petitioners' counsel due to the irreconcilable differences that had arisen between them.

Notwithstanding Ms. Miller's knowledge of those differences, her repeated representations to the Tax Court that Mr. Kauffman had no authority to act on behalf of Petitioners, and her testimony at the evidentiary hearing that she "believed at that point in time that Mr. Kauffman and Mr. Gazi had patched up their differences to the extent that Mr. Kauffman was going to be representing him in an effort to try to get the cases continued," December 15, 2004 Transcript of Proceedings at 256, Mr. Kauffman and Ms. Miller called the Tax Court the next day, May 16, 2003, and "reported that the parties had agreed to bases for settling these cases." (App. 9a.) Ms. Miller faxed a letter to Mr. Kauffman that morning in which she memorialized a "settlement agreement" reached with Mr. Kauffman with respect to Petitioners' cases. The agreement required Petitioners to concede all adjustments in full, but did not require their signatures. Mr. Kauffman thereafter signed the settlement agreement and faxed it to Ms. Miller. Mr. Kauffman did not send Mr. Gazi the settlement agreement.

Later that day, May 16, 2003, Mr. Kauffman told Mr. Gazi that the trial had been postponed but did not inform

him about the settlement agreement that Mr. Kauffman signed. At 5:00 p.m. that day, Mr. Gazi called Mr. Kell and told him about the postponement, but he did not tell Mr. Kell that the cases had been settled because Mr. Kauffman never shared this information with Mr. Gazi. Mr. Kell testified that he would have been astounded had he been told about the purported settlement because Mr. Gazi was adamant about fighting the deficiency claim, had never wavered from his position, and thought he had a great case. *See* December 15, 2004 Transcript of Proceedings at 157.

On June 3, 2003, a stipulated decision executed by Mr. Kauffman and Ms. Miller reflecting a full concession by Petitioner, All Community Walk In Clinic, was submitted to the Tax Court, which entered the decision on June 5, 2003. (App. 10a.) On June 30, 2003, another stipulated decision, also executed by Mr. Kauffman and Ms. Miller, was submitted with respect to the remaining Petitioners. (*Id.*) The Tax Court entered its decision on July 8, 2003. (*Id.*) Mr. Kauffman did not send Petitioners copies of the executed decisions or advise them that the Tax Court had entered the decisions, with the result that no notices of appeal or timely motions to vacate or revise the decisions were filed. The decisions became final on September 1, 2003, and October 6, 2003, respectively. (*Id.*)

Mr. Gazi first learned of the decisions entered in these cases in November of 2003 when he received collection notices from the Internal Revenue Service. Until receipt of the collection notices, Mr. Gazi was not aware that these cases had been settled or that judgments had been entered. Mr. Gazi contacted Mr. Kell to discuss the notices, and, not fully understanding the import of the collection notices, asked Mr. Kell to do whatever was necessary to have the cases tried in Baltimore. As the Tax Court noted, Mr. Kell declined to undertake the representation. (App. 16a.)

2. Decisions Below.

Petitioners thereafter retained new counsel, who, in March of 2004, filed motions for leave to file motions to vacate the Tax Court's decisions. (App. 10a.) Following an evidentiary hearing that took place on December 15, 2004, the Tax Court issued a written opinion on July 28, 2005, denying the motions for leave. Stating that the Tax Court "has jurisdiction to set aside an otherwise final decision if

there is fraud on the Court," the Tax Court declared that "the mere fact that counsel might settle a suit without the client's authorization does not establish fraud on the court so as to support vacating a final decision." (App. 16a, 17a.) Rejecting Petitioners' argument t' at Mr. Kauffman's "authority was limited to seeking a continuance on petitioners' behalf," the Tax Court concluded that "petitioners have failed to show that Mr. Kauffman lacked authority to consent to the entry of the decisions in these cases or that Ms. Miller, at the time the settlement agreement was reported to the Court or the stipulated decision documents were submitted, had reason to believe he lacked such authority." (App. 19a, 22a.)

Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed. Rather than question the Tax Court's authority to vacate its decisions once they become final, the Court of Appeals assumed hypothetically that such authority exists and concluded that vacatur was not warranted because "[t]he record supports the Tax Court's finding that [Petitioners'] former attorney was authorized to execute the stipulated decisions on [Petitioners'] behalf. Additionally, even if [Petitioners'] former attorney lacked authority, his conduct would not amount to fraud on the court." (App. 2a.) The Court of Appeals held, therefore, that the Tax Court did not abuse its discretion in denying Petitioners' motions for leave to file motions to vacate the Tax Court's decisions.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case presents important questions over which the federal appellate courts are divided concerning the United States Tax Court's jurisdiction to vacate a final decision on equitable grounds. Review is warranted to decide whether the Tax Court has authority to vacate its decisions after they become final, and, if so, whether that authority should have been exercised here.

Stating that, "[a]s a general rule, a Tax Court lacks jurisdiction to vacate a decision once it becomes final," the Court of Appeals in this case noted that "some Circuits have recognized a fraud-on-the-court exception to this general rule." (App. 2a.) Although "every federal appellate court has a special obligation 'to satisfy itself not only of its own

jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it," *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)), the Court of Appeals refused to decide whether the Tax Court had jurisdiction to revise its final decisions here on the basis of fraud or any other exception. Rather than do so, the Court of Appeals accepted the Commissioner's invitation to "affirm the Tax Court's orders without resolving the question whether the Tax Court has jurisdiction . . . to vacate a decision after it has become final," September 22, 2006 Brief for the Appellee at 28, Nos. 05-16314-II and 05-16315-II (11th Cir.), concluding, based on the merits of Petitioners' motions to vacate, that the Tax Court did not abuse its discretion in denying the motions for leave.

In assuming hypothetically that the Tax Court had jurisdiction to vacate its decision on the basis of fraud, the Court of Appeals joined other federal appellate courts which acknowledged the fraud exception but affirmed the Tax Court decisions at issue there without deciding whether jurisdiction to vacate existed. The United States Court of Appeals for the Second Circuit, for example, recognized in *Cinema '84 v. Commissioner of Internal Revenue*, 412 F.3d 366 (2nd Cir.2005), that "we have not explicitly adopted any of the exceptions to the general rule" that "once the Tax Court's decision becomes final, the court no longer has the authority to vacate its decision," but concluded that "it is unnecessary for us to decide in the present case which, if any, of the exceptions this Court recognizes because regardless of how [the appellant's] argument is characterized, vacatur was not warranted here." *Id.* at 371.

Similarly, noting that "the authorities are not in agreement," and despite "a continued objection by the Government to the jurisdictional basis" for an evidentiary hearing on a motion to revise a Tax Court decision, the United States Court of Appeals for the Third Circuit in *Stickler v. Commissioner of Internal Revenue*, 464 F.2d 368 (3rd Cir.1972), assumed without deciding that a fraud exception existed and concluded that the allegation of fraud was not borne out by the record. *Id.* at 370-71.

Other federal appellate courts, however, have refused to recognize any such exception, stating that "once a decision

of the Tax Court becomes final, the Tax Court no longer has jurisdiction to consider a motion to vacate its decision." *Harbold v. Commissioner of Internal Revenue*, 51 F.3d 618, 621 (6th Cir.1995). Recognizing the principle that "[t]he Tax Court is a court of limited jurisdiction and lacks general equitable powers," *Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam), some federal appellate courts have concluded that the Tax Court "is a creature . . . of limited jurisdiction" and has no revisory authority beyond "the time when its decision shall have become final." *Jefferson Loan Co. v. Commissioner of Internal Revenue*, 249 F.2d 364, 367 (8th Cir.1957). *See also Webbe v. Commissioner of Internal Revenue Service*, 902 F.2d 688, 689 (8th Cir.1990) ("Our *Jefferson Loan* case, 249 F.2d at 367, refuses to recognize the exception for fraud.").

Two Courts of Appeals which initially embraced the view that the Tax Court lacks "the power to set aside or change its decision" once "its decision has become final," *Lentin v. Commissioner of Internal Revenue*, 243 F.2d 907, 908 (7th Cir.1957), and thus is "without jurisdiction to set aside its [final] decision," *Lasky v. Commissioner of Internal Revenue*, 235 F.2d 97, 100 (9th Cir.1956), *aff'd*, 352 U.S. 1027 (1957) (per curiam), later carved out an exception "to permit the tax court to consider whether its decision is the product of a fraud upon it," stating that "it can be reasoned that a decision produced by fraud upon the court is not in essence a decision at all, and never becomes final." *Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, 691 (7th Cir.), *cert. denied*, 393 U.S. 841 (1968). *Accord Toscano v. Commissioner of Internal Revenue*, 441 F.2d 930, 933 (9th Cir.1971).

But as pointed out in the brief that the Commissioner filed with the Court of Appeals in this case, these same two federal appellate courts recognized a fraud-on-the-court exception "based partly on [the] fact that the Commissioner conceded in those cases that such an exception existed." Brief for the Appellee at 26. *See Kenner*, 387 F.2d at 690 ("[C]ounsel for the commissioner tells us: 'Although the matter is not entirely free from doubt, it is the considered position of the Commissioner that the Tax Court, vested with a part of the judicial power of the United States, has the inherent power to undo that which has been obtained

from it by fraud and that the 'finality' provisions of [26 U.S.C.] Section 7481 do not deprive it of that power expressly or by necessary implication."); *Toscano*, 441 F.2d at 933 ("The Commissioner makes the same concession as to the power of the Tax Court, citing *Kenner*. Under these circumstances, we hold that the Tax Court can, after its decision becomes final, set it aside on the narrow ground of fraud on the court.").

Neither the Commissioner's concessions in *Kenner*, *Toscano*, nor this case are an adequate substitute for a judicial determination that the Tax Court has authority to vacate its final decisions. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) ("[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it.") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997)) (other citations omitted).

In addition to this disagreement among the federal appellate courts over the jurisdiction of the Tax Court to revise its final decisions, there is also, as the Tax Court observed in another case, "a split of authority between two Courts of Appeals as to whether prejudice is a necessary element of fraud on the Court." *Calderone v. Commissioner of Internal Revenue*, 89 T.C.M (CCH) 1479, 2005 WL 1484042, *7 (U.S.Tax Ct. 2005). The United States Court of Appeals for the Seventh Circuit, for example, requires that "a taxpayer who attempts to set aside a prior judgment of the Tax Court must also explain how the alleged conduct induced, caused, or had a material effect upon the decision." *Drobny v. Commissioner of Internal Revenue*, 113 F.3d 670, 678 (7th Cir.), *cert. denied*, 522 U.S. 916 (1997).

In contrast, citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), in which this Court observed that "tampering with the administration of justice . . . involves far more than an injury to a single litigant" and "is a wrong against the institutions set up to protect and safeguard the public," *id.* at 246, the United States Court of Appeals for the Ninth Circuit has held that "[p]rejudice is not an element of fraud on the court." *Dixon v. Commissioner of Internal Revenue*, 316 F.3d 1041, 1046 (9th Cir.2003). Explaining the basis for this conflict, the

Court of Appeals in *Dixon* observed that "*Drobny* distinguishes *Hazel-Atlas* by claiming that *Hazel-Atlas* involved the general equitable powers of the federal courts as opposed to those of the Tax Court," while "[t]he Ninth Circuit, however, holds to the view that the application of the fraud on the court doctrine in the context of Tax Court cases is the same as applied in Article III courts." *Id.* at 1046 n.9.

This Court should resolve these conflicts and hold that the Tax Court has authority which it should have exercised to vacate its decisions in this case. It is well-settled that a final judgment can be vacated when "the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, . . . or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side." *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878). The Tax Court decisions in this case should be vacated because this is precisely what happened here.

As the Tax Court recognized, the Commissioner's counsel, Ms. Miller, represented to the Tax Court, twice, that "petitioners' former counsel is no longer authorized to act on behalf of petitioners" as of that date. (App. 8a, 13a.) It is also undisputed that several days later, on May 15, 2003, the same "former counsel," Mr. Kauffman, faxed Ms. Miller motions to withdraw as counsel in which he discussed his unpaid attorneys' fees and a conversation he had the prior day with Mr. Gazi in which "irreconcilable differences arose between the petitioner and Kauffman making it impossible for Kauffman to continue his representation." (App. 14a.) By subsequently representing to the Tax Court that there was an agreement of the parties to settle their differences, when both lawyers "knew or should have known of the falsity" of their representations that they had the authority to act in this manner, Ms. Miller and Mr. Kauffman "engaged in fraud or other misconduct" that "prevented the moving party from fully and fairly presenting his case." *Harre v. A.H. Robins Co., Inc.*, 750 F.2d 1501, 1503 (11th Cir.1985) (quotations and citations omitted), *modified on other grounds*, 866 F.2d 1303 (11th Cir.1989).

The Tax Court observed that after Mr. Kauffman faxed the motions to withdraw and other documents to Ms. Miller, they had a telephone call with Mr. Gazi in which he purportedly "confirmed Mr. Kauffman's authority to represent petitioners." (App. 14a.) But that authority, as Ms. Miller testified, was limited to getting the continuance of these cases which was the subject of the motions for a continuance that Mr. Kauffman had faxed to her along with the motions to withdraw. *See* December 15, 2004 Transcript of Proceedings at 256. As the Tax Court stated, however, these motions were never filed. (App. 9a, 14a.) As a result, the Tax Court, unlike Mr. Kauffman and Ms. Miller, was unaware of Mr. Kauffman's lack of authority to settle these cases.

Mr. Gazi was also unaware that these motions had not been filed. Indeed, as the Tax Court noted, he told Mr. Kauffman that he had retained new counsel, Mr. Kell (App. 14a), who testified that he had spoken with Mr. Gazi on the same day Mr. Kauffman and Ms. Miller represented to the Tax Court that the parties had settled, and was told by Mr. Gazi that he had been informed by Mr. Kauffman that the continuance had been granted. (App. 15a.) Mr. Kell also testified that he would have been "astounded" had he been told about the purported settlement in light of Mr. Gazi's adamant insistence about fighting the deficiency claims. *See* December 15, 2004 Transcript of Proceedings, at 157.

"Although an attorney is presumed to possess authority to act on behalf of the client, 'a judgment entered upon an agreement by the attorney may be set aside on affirmative proof that the attorney had no right to consent to its entry.'" *Surety Ins. Co. v. Williams* 729 F.2d 581, 582-83 (8th Cir. 1984) (citations omitted). The Court of Appeals in this case stated that "even if [Petitioners'] former attorney lacked authority, his conduct would not amount to fraud on the court" (App. 2a), but *both* Mr. Kauffman *and* Ms. Miller knew and concealed from the Tax Court that Mr. Kauffman was authorized to represent Petitioners only for the purpose of obtaining a continuance. Ms. Miller also knew, based on the letters from Dr. Gazi's physicians that she had seen on the same day Mr. Kauffman faxed her the motions for a continuance and to withdraw as counsel, that Dr. Gazi was gravely ill and was in no position to participate in the trial that Mr. Gazi was led to believe was being continued.

In these circumstances, the representations of Mr. Kauffman and Ms. Miller to the Tax Court that the cases had been settled were "plainly designed to corrupt the legitimacy of the truth-seeking process." *Dixon v. Commissioner of Internal Revenue*, 316 F.3d at 1046. Certiorari should be granted to decide whether the United States Tax Court has authority which it should have exercised to vacate its final decisions on the grounds raised by Petitioners.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. Following review, the judgment should be reversed.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16314

U.S. TAX Court No. 7949-98

ALL COMMUNITY WALK IN CLINIC,
Petitioner-Appellant,
versus
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 05-16315

U.S. TAX Court No. 7950-98

MOHAMMED A. GAZI,
ESTATE OF RAEES I. GAZI, Mohammed A. Gazi,
Personal Representative,
versus
Petitioners-Appellants,
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Petitions for Review of a Decision of the

United States Tax Court

(May 10, 2007)

Before TJOFLAT, BLACK and EBEL,[1] Circuit Judges.

PER CURIAM:

Appellants All Community Walk In Clinic, Mohammed A. Gazi, and Estate of Raees I. Gazi contend the U.S. Tax Court abused its discretion in denying their motion for leave to file a motion to vacate the Tax Court's stipulated final decisions entered June 5, 2003, and July 8, 2003. Specifically, Appellants argue their former attorney and the Commissioner's attorney perpetrated a fraud on the court by executing the stipulated decisions without Appellants' authorization. After reviewing the record and hearing oral argument, we affirm.

As a general rule, a Tax Court lacks jurisdiction to vacate a decision once it becomes final. *Davenport Recycling Assocs. v. Comm'r,* 220 F.3d 1255, 1259 (11th Cir. 2000). While some Circuits have recognized a fraud-on-the-court exception to this general rule, this Circuit has not adopted such an exception. *See id.* at 1259, 1262.[2] In this case, we need not decide whether the fraud-on-the-court exception applies. We agree with the Tax Court's conclusion that Appellants' former attorney and the Commissioner's attorney did not perpetrate a fraud on the court. The record supports the Tax Court's finding that Appellants' former attorney was authorized to execute the stipulated decisions on Appellants' behalf. Additionally, even if Appellants' former attorney lacked authority, his conduct would not amount to fraud on the court. *See, e.g., Senate Realty Corp. v. Comm'r,* 511 F.2d 929, 931-32 (2d Cir. 1975) (finding that although the

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[1] Honorable David M. Ebel, United States Circuit Judge for the Tenth Circuit, sitting by designation.

[2] In *Davenport*, we addressed the fraud-on-the-court exception, acknowledging that it has been recognized by other jurisdictions. *Davenport*, 220 F.3d at 1259, 1262. Because we affirmed the Tax Court's finding that no fraud had been perpetrated on the court, we did not expressly decide whether to the adopt the exception as a ground for vacating a Tax Court's final decision. *See id.* at 1262.

attorney representing the taxpayer was unauthorized to settle the IRS claim against the taxpayer, the attorney's action in filing a settlement stipulation in Tax Court did not represent a fraud on the Tax Court). Accordingly, we conclude the Tax Court did not abuse its discretion in denying Appellants' motion for leave to file a motion to vacate the Tax Court's stipulated final decisions. *See Davenport,* 220 F.3d at 1259 (reviewing the Tax Court's denial of leave to file a motion to vacate for abuse of discretion).

AFFIRMED.

T.C. Memo. 2005-190

UNITED STATES TAX COURT

ALL COMMUNITY WALK IN CLINIC, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

MOHAMMED A. GAZI AND ESTATE OF RAEES I. GAZI, DECEASED, MOHAMMED A. GAZI, PERSONAL REPRESENTATIVE, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 7949-98, 7950-98.
Filed July 28, 2005.

Caroline D. Ciraolo, for petitioners.[3]

Monica J. Miller, for respondent.

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[3] Petitioners were represented by Jay E. Kauffman when they filed their petitions. On Mar. 12, 2004, Caroline D. Ciraolo entered these cases. On Dec. 15, 2004, the Court granted petitioners' motions to withdraw Mr. Kauffman as counsel in these cases.

MEMORANDUM FINDINGS OF FACT AND OPINION

THORNTON, Judge: This matter is before the Court on petitioners' motions for leave to file motions to vacate the final decisions of this Court, which were entered July 8, 2003 (the motions).[4] Petitioners contend that the decisions resulted from perpetration of fraud on the Court by their former counsel, Jay E. Kauffman (Mr. Kauffman), and respondent's counsel, Monica J. Miller (Ms. Miller), in entering into allegedly unauthorized settlement agreements. Respondent disagrees and objects to the motions.

Procedural Background

On January 30, 1998, respondent issued a notice of deficiency with respect to Mohammed A. and Raees I. Gazi (the Gazis), and a separate notice of deficiency with respect to Mrs. Gazi's wholly owned corporation, All Community Walk In Clinic.[5] With respect to the Gazis, respondent determined increases in tax liabilities for tax years 1983 to 1989 totaling $787,982; respondent also asserted civil fraud penalties totaling about $500,000. With respect to All Community Walk In Clinic, respondent determined increases in tax liabilities for tax years 1983 to 1989 totaling $341,043, plus additions to tax for negligence and delinquency. The adjustments in the notices of deficiency reflected primarily respondent's determinations that petitioners had understated income and overstated deductions. Many of the issues in the two cases are intrinsically related.

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[4] Due to an identity of issues presented by the motions before the Court, the cases at docket Nos. 7949-98 and 7950-98 have been consolidated herewith for the purpose of this opinion.

[5] Raees I. Gazi died on July 23, 2003, after the decisions had been entered in these cases.

On April 29, 1998, the Gazis and All Community Walk In Clinic filed petitions in this Court, challenging respondent's determinations in the notices of deficiency. The petitions were signed by Mr. Kauffman, who is an attorney authorized to practice before this Court. On June 30 and July 2, 1998, respondent filed answers in these cases. The cases were set for trial at the session of the Court beginning April 26, 1999, in Tampa, Florida.

On February 11, 1999, pursuant to Rule 90, respondent filed requests for admission in the Gazis' case (docket No. 7950-98).[6] In the 133 numbered items in respondent's requests for admission, respondent requested the Gazis to admit the various elements of the adjustments to taxable income reflected in the Gazis' notice of deficiency. No response to respondent's request for admissions was filed by or on behalf of the Gazis. Consequently, pursuant to Rule 90(c), each matter set forth in respondent's requested admissions was deemed admitted.

On March 15, 1999, respondent filed motions to compel responses to interrogatories and document production requests that respondent had served on petitioners in each of these cases on February 10, 1999. By Orders dated March 18, 1999, this Court granted respondent's motions in that petitioners were required, on or before April 1, 1999, to respond to the interrogatories and document production requests. Petitioners were further ordered to show cause in writing on or before April 5, 1999, why the Court should not impose sanctions, or else to advise the Court in writing by that date that they were in full compliance with the Court's Order. Petitioners filed no response to the Court's Orders to Show Cause.

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[6] Unless otherwise indicated, Rule references are to the Tax Court Rules of Practice and Procedure and section references are to the Internal Revenue Code, as amended.

On March 22, 1999, the trials in these cases were continued, and the parties were ordered to file periodic status reports. On behalf of respondent, Ms. Miller filed status reports in May, August, and September 1999; in each report, she advised the Court that petitioners and respondent's revenue agent were meeting regularly to discuss settlement. Petitioners filed no status reports.

By notices dated August 3, 2000, for the second time, the Court set these cases for trial, at the session of the Court beginning January 8, 2001, in Tampa, Florida. Subsequently, because no courtroom was available in Tampa, the Court changed the place of trial to Jacksonville, Florida. On December 13, 2000, petitioners filed motions for continuance on the ground that moving the trials to Jacksonville would work a hardship on them. The Court granted petitioners' motions for continuance.

On May 10, 2001, for the third time, the Court issued notices setting the cases for trial, at the session of the Court beginning October 15, 2001, in Tampa, Florida. Pursuant to the parties' joint requests, on September 25, 2001, the trials were continued again.

On May 23, 2002, for the fourth time, the Court issued notices setting the cases for trial, at the session of the Court beginning October 28, 2002, in Tampa, Florida. On October 16, 2002, petitioners filed motions for continuance, on the grounds that the Gazis had moved to Baltimore, Maryland, and wished to transfer the place of trial there. The Court granted petitioners' motions.

On December 18, 2002, for the fifth time, the Court issued notices setting the cases for trial, at the session of the Court beginning May 19, 2003, in Baltimore, Maryland. On January 23, 2003, the Court ordered the parties to file a joint status report on or before March 19, 2003, advising the Court of the progress that had been made in preparing for trial. On March 19, 2003, respondent filed a status report, signed by Ms. Miller, indicating that on the basis of representations by petitioners and their counsel, she believed that a

forthcoming revenue agent's final report should form the basis for a probable settlement. Petitioners filed no status report.

On May 7, 2003, the Court received respondent's trial memoranda, as required by the Court's Standing Pre-Trial Order. The Court received no trial memorandum from petitioners.

On May 8, 2003, the Court made absolute its March 18, 1999, Orders to Show Cause why the Court should not impose sanctions on petitioners pursuant to Rule 104; as a sanction, the Court ordered that petitioners were prohibited from introducing into evidence any testimony or documents that would have been responsive to respondent's discovery requests served on petitioners February 10, 1999.

On May 13, 2003, respondent filed a supplemental status report, dated May 12, 2003, in which Ms. Miller stated, among other things, that in a telephone conversation on May 5, 2003, Mr. Gazi had informed Ms. Miller that he was attempting to work out the details of retaining a Baltimore attorney, Mark Edward Kell (Mr. Kell) to represent petitioners; and that in a telephone conversation on May 7, 2003, Mr. Kell had told Ms. Miller that he "believed he would be entering his appearance, and that he would be requesting a continuance", and that he would send Ms. Miller a facsimile of his entry of appearance when it was ready for filing so that they could have a meaningful discussion of these cases. The supplemental status report states:

> It is now Monday, May 12th, 2003. Respondent's counsel has heard nothing further from petitioners, petitioners' former counsel, or petitioners' prospective counsel. Moreover, petitioners' former counsel is no longer authorized to act on behalf of petitioners; petitioners' prospective counsel has not provided an entry of appearance or power of attorney

> so is not authorized to act on behalf of petitioners; and respondent is prohibited from contacting petitioners directly because petitioners are represented by counsel. Therefore, respondent has no one with whom to complete trial preparation or the stipulation process.[7]

On May 14, 2003, these matters were discussed in a telephonic conference among the Court, Mr. Kauffman, and Ms. Miller. Mr. Kauffman informally requested the Court to continue these cases and to allow him to withdraw as counsel. The Court advised that any motion to continue or to withdraw as counsel should be filed with the Court in writing and that the parties should be prepared to argue any such motions on the record at the May 19, 2003, calendar call. Petitioners filed no motion to continue these cases or to withdraw Mr. Kauffman as counsel. No other representative filed any entry of appearance on petitioners' behalf.

On May 16, 2003, in a telephonic conference with the Court, Mr. Kauffman and Ms. Miller reported that the parties had agreed to bases for settling these cases. They requested permission for respondent's local Baltimore counsel to lodge facsimile decision documents with the Court at the May 19, 2003, calendar call, so that Mr. Kauffman and Ms. Miller would not have to travel from Florida to Baltimore for that purpose. To allow time for reviewing the tax computations in the decision documents, they requested to have until June 30, 2003, to submit stipulated decisions.

At the May 19, 2003, calendar call in Baltimore, Maryland, counsel for respondent, Clare Brooks,

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[7] Also on May 13, 2003, respondent filed motions to request a date and time certain in these cases, and a motion to consolidate these cases for trial, briefing, and opinion, wherein Ms. Miller made similar statements. These motions were ultimately denied as moot.

appeared and lodged with the Court facsimile decision documents, signed by Mr. Kauffman and Ms. Miller, in each of these cases. There was no appearance by or on behalf of petitioners. On June 3, 2003, a stipulated decision in docket No. 7949-98, executed by Mr. Kauffman and Ms. Miller, was submitted to the Court. The stipulated decision reflected a full concession by petitioner All Community Walk In Clinic. On June 5, 2003, the Court entered its decision in docket No. 7949-98 pursuant to the stipulation. No notice of appeal or timely motion to vacate or revise the decision having been filed in this case, the decision in docket No. 7949-98 became final on September 1, 2003. See sec. 7481(a)(1); Fed. R. App. P. 13(a).

On June 30, 2003, the parties submitted to the Court a stipulated decision in docket No. 7950-98, executed by Mr. Kauffman and Ms. Miller. The stipulated decision reflected certain concessions by both parties: Total deficiencies for the 7 years at issue were reduced by $568,259 ($219,723 in the stipulated decision versus $787,982 in the notice of deficiency), and additions to tax for negligence were substituted for the civil fraud penalty, resulting in a further reduction of over $300,000 in petitioners' tax liability as determined in the Gazis' notice of deficiency. On July 8, 2003, the Court entered its decision in docket No. 7950-98 pursuant to the stipulation. No notice of appeal or timely motion to vacate or revise the decision having been filed in this case, the decision in docket No. 7950-98 became final on October 6, 2003. See sec. 7481(a)(1); Fed. R. App. P. 13(a).

On March 12, 2004, petitioners filed motions for leave to file motions to vacate final decisions in these cases, lodging therewith their motions to vacate. The motions were signed by Caroline D. Ciraolo, who on the same date filed entries of appearance in these cases. Also on the same date, petitioners filed motions to withdraw Mr. Kauffman as counsel in these cases.

On December 15, 2004, the Court held an evidentiary hearing in Washington, D.C., with respect to the motions.[8] At the commencement of the hearing, the Court granted petitioners' motions to withdraw Mr. Kauffman as counsel. At the conclusion of the hearing, the Court directed the parties to file legal briefs.

FINDINGS OF FACT

The parties have stipulated some facts, which we incorporate herein by this reference.

After the petitions were filed in these cases, petitioners, directly and indirectly through Mr. Kauffman, attempted to work with respondent's revenue agent toward settlement. After four continuances of these cases, Ms. Miller sent Mr. Kauffman a letter dated April 10, 2003, enclosing a revenue agent's report and corresponding computations, along with a settlement proposal for both cases. Ms. Miller's letter stated that trial was scheduled for May 19, 2003, that petitioners had repeatedly delayed this matter, and that it was her belief that the Court would allow no further delays. The letter stated that, in preparing the report upon which the settlement offers were based, the revenue agent had considered and, for the most part, accepted the latest information provided by petitioners. With respect to the Gazis' case, the letter stated that for settlement purposes only, respondent would agree to substitute negligence penalties for the civil fraud penalty, and that the settlement offer would result in a reduction of about $500,000 in taxes and of about $300,000 in penalties. With respect to the All Community Walk In Clinic case, the letter stated that "because the petitioners have effectively conceded the corporate case", the settlement proposal would require a full concession by petitioner in that case. The letter stated that the settlement proposals

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[8] The hearing was delayed in part at the request of petitioners' new counsel because of her pregnancy.

were final and would be withdrawn unless accepted on or before May 2, 2003.

On April 30, 2003, Mr. Kauffman contacted Ms. Miller, advising her that he was unable to reach petitioners, having lost contact with them. He requested an extension of the settlement offer deadline. Ms. Miller offered to help locate the Gazis' address and agreed to extend the settlement offer deadline on the condition that Mr. Kauffman express mail to the Gazis the settlement proposal and the notice setting the case for trial.

On May 2, 2003, Mr. Gazi received from Mr. Kauffman the April 10, 2003, settlement proposal and notice of the May 19, 2003, trial session. Mr. Gazi immediately called Ms. Miller, explaining that he had just received the package and that Mrs. Gazi was very ill.[9] Ms. Miller told him that he should call his attorney and that the settlement offer had been extended to May 5, 2003.

Mr. Gazi then contacted Mr. Kauffman. He told Mr. Kauffman about his wife's medical condition and said that they did not want to settle; they wanted to go to trial. Mr. Kauffman advised Mr. Gazi to find local counsel in Baltimore, where the cases were set for trial.

Mr. Gazi contacted Mark E. Kell, a Baltimore tax attorney. In a meeting with Mr. Gazi on May 6, 2003, Mr. Kell laid down three conditions that needed to be satisfied before he would agree to represent petitioners in these cases: First, he would not represent petitioners unless continuances were granted in these cases because "I'm not taking a case that's been around for seven years 10 days before trial." Second, he required petitioners to pay him, in advance, a $20,000 fee. Third, he required an opportunity to review the files to see if petitioners "have

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[9] Sometime in February or March 2003, Mrs. Gazi had been hospitalized and diagnosed with carcinoid syndrome.

a case". Mr. Gazi telephoned Ms. Miller from Mr. Kell's office and left a voice message requesting Ms. Miller to contact Mr. Kell. Mr. Gazi also told Mr. Kauffman that he was meeting with and retaining Mr. Kell. Subsequently, Ms. Miller and Mr. Kauffman learned that Mr. Kell did not intend to enter these cases unless they were continued.

Shortly after the initial meeting with Mr. Kell, Mr. Gazi paid him $500. Mr. Kell told him that he could not accept the $500 to start working on petitioners' cases but agreed to accept it as partial payment for time he had already spent on their cases. Petitioners never paid Mr. Kell the remainder of the requested advance $20,000 fee. Mr. Kell never entered an appearance in these cases. Nevertheless, sometime before May 7, 2003, Mr. Gazi spoke to Ms. Miller and told her that Mr. Kell was representing petitioners and "that since we are here in Baltimore, Mr. Kauffman will not be representing us".[10]

On the morning of May 14, 2003, Mr. Gazi faxed to Mr. Kauffman and Ms. Miller copies of physicians' letters regarding Mrs. Gazi's medical condition. Later that day, Mr. Kauffman advised Mr. Gazi of the telephonic conference with Ms. Miller and the Court, in which the Court had declined to entertain Mr. Kauffman's informal motions for continuance. Mr. Gazi relayed this information to Mr. Kell. According to Mr. Kell's contemporaneous notes of this conversation, which are in evidence: "The issue of Jay Kauffman withdrawing and my entering my appearance will be resolved after the continuance is granted, not before." In another conversation that day, Mr. Kell advised Mr. Gazi that depending on how much he owed the IRS, the approximately $800,000 reduction reflected in

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[10] Apparently on the basis of these representations, in various documents filed with the Court on May 12, 2003, (as previously described) Ms. Miller stated that "petitioners' former counsel [Mr. Kauffman] is no longer authorized to act on behalf of petitioners".

respondent's settlement offer might be "too good to pass up." He also indicated to Mr. Gazi that because of the deemed admissions relating to the income items in the Gazis' case, "he may not have a case at all".

The morning of May 15, 2003, Mr. Gazi faxed a letter to Mr. Kell and Mr. Kauffman, addressed "Dear Mark and Jay", in which he complained that respondent's revenue agent had made "repeated mistakes" in her report. Mr. Gazi's letter stated: "We have to restart the whole case".

The afternoon of May 15, 2003, Mr. Kauffman faxed to Ms. Miller written motions to continue these cases, attaching the physicians' letters he and Ms. Miller had received from Mr. Gazi. The motions to continue were never filed with the Court. The facsimile transmission to Ms. Miller also included written motions by Mr. Kauffman to withdraw as counsel in these cases. The motions to withdraw as counsel, which were never filed with the Court, state that petitioners owed Mr. Kauffman over $20,000, that on May 5, 2003, Mr. Kell had informed Mr. Kauffman that petitioners were retaining him as counsel, and that on May 14, 2003, Mr. Kauffman spoke with Mr. Gazi "who confirmed that Mr. Kell had been retained. During the conversation irreconcilable differences arose between the petitioner and Kauffman making it impossible for Kauffman to continue his representation." The motion quotes respondent's supplemental status report, dated May 12, wherein Ms. Miller had stated: "petitioners' former counsel is no longer authorized to act on behalf of petitioners".

Shortly after faxing these documents to Ms. Miller, Mr. Kauffman had a telephonic conference with Mr. Gazi and Ms. Miller. In this telephonic conference, Mr. Gazi confirmed Mr. Kauffman's authority to represent petitioners. In a separate conversation with Mr. Gazi on the evening of May 15, 2003, Mr. Kauffman went over respondent's settlement offer and urged that petitioners should accept it; he opined that because of petitioners' financial situation, they should be able either to work out

an offer in compromise or else eventually pursue bankruptcy. According to Mr. Kauffman's testimony, Mr. Gazi authorized Mr. Kauffman to settle the cases.

The next morning, May 16, 2003, Mr. Kauffman telephoned Ms. Miller and advised her that "we've got permission to settle and we've got an agreement", pending his review of some documentation and a review of the calculations. Later that day, after the parties had reported the settlement agreement to the Court in a telephonic conference, Mr. Gazi telephoned Mr. Kell. According to Mr. Kell's notes, Mr. Gazi had "called J.K. [Jay Kauffman] and was told continuance granted to 6/30/03. J.K. and M.M. [Monica Miller] were also told to settle." Mr. Kell pointed out to Mr. Gazi "the advantages of settling and then doing a Chapter 7 in three years and a day from the assessment date." Mr. Kell and Mr. Gazi had no further communications until November, as described below.

On June 15, 2003 (after the decision documents had been lodged with the Court and shortly before the stipulated decisions were due to be submitted to the Court), Mr. Kauffman met with Mr. Gazi and his son in Baltimore, after driving from Florida for that purpose. At this meeting, which lasted for several hours, Mr. Kauffman reviewed the settlement offer in the Gazis' case with Mr. Gazi and his son for computational errors or omitted adjustments. Mr. Kauffman then explained to Mr. Gazi and his son that he would contact Ms. Miller and request further review of certain iteMs. He gave Mr. Gazi an "approximate number" of the "fairly large" tax liability that would result from the settlement agreement and reiterated that petitioners could pursue previously discussed options in seeking an offer in compromise or uncollectible status. Mr. Kauffman then went out to dinner with Mr. Gazi and his son.

Mr. Kauffman subsequently spoke with Ms. Miller and requested several computational adjustments. Certain computational adjustments were made, as reflected in the

stipulated decision that was filed with the Court on June 30, 2003.

In November 2003, Mr. Gazi received IRS collection notices for the liabilities reflected in the stipulated decisions. Mr. Gazi called Mr. Kell to seek his legal assistance. In a letter to Mr. Kell dated November 18, 2003, Mr. Gazi wrote: "I have fired Mr. Kauffman." Mr. Kell declined to take the case, and Mr. Gazi asked Mr. Kell to return the $500 he had paid him in the spring.

OPINION

A decision of this Court becomes final 90 days after it is entered, if no party files a notice of appeal. Secs. 7481(a)(1), 7483. A motion to vacate or revise a decision generally must be filed within 30 days after entry of the decision, unless the Court permits otherwise. Rule 162.

The finality of a decision is generally absolute, and the Tax Court's authority to vacate a final decision is limited. Cinema '84 v. Commissioner, 122 T.C. 264, 270 (2004), affd. 2005 WL 1459573, 2005 U.S. App. LEXIS 11956 (2d Cir., June 22, 2005). This Court has jurisdiction to set aside an otherwise final decision if there is fraud on the Court. Id.; see Davenport Recycling Associates v. Commissioner, 220 F.3d 1255, 1259 (11th Cir. 2000), affg. T.C. Memo. 1998-347; Taub v. Commissioner, 64 T.C. 741, 751 (1975), affd. without published opinion 538 F.2d 314 (2d Cir. 1976). In the context of a motion to vacate a final Tax Court decision, fraud on the court is narrowly construed to require "'an unconscionable plan or scheme which is designed to improperly influence the court in its decision,' preventing the opposing party 'from fully and fairly presenting his case.'" Davenport Recycling Associates v. Commissioner, supra at 1262 (quoting Abatti v. Commissioner, 859 F.2d 115, 118 (9th Cir. 1988), affg. 86 T.C. 1319 (1986)); see Toscano v. Commissioner, 441 F.2d 930, 934 (9th Cir. 1971), vacating 52 T.C. 295

(1969). To prove fraud on the court, petitioners bear the heavy burden of presenting specific facts establishing that "an intentional plan of deception designed to improperly influence the Court in its decision has had such an effect on the Court." Abatti v. Commissioner, 86 T.C. at 1325; see Drobny v. Commissioner, 113 F.3d 670, 677-678 (7th Cir. 1997), affg. T.C. Memo. 1995-209; Kenner v. Commissioner, 387 F.2d 689, 691 (7th Cir. 1968).

In their memoranda in support of their motions for leave to file motions to vacate, petitioners state: "Petitioners' former counsel, Jay Kaufman [sic], and Respondent's counsel, Monica Miller, perpetrated a fraud against the Tax Court, even if done unintentionally, by executing settlement agreements and Decision documents without Petitioners' knowledge or authorization, and with the full knowledge that Mr. Kaufman [sic] did not represent Petitioners at the time the documents were executed."

At the outset, we observe that petitioners' notion of persons "unintentionally" perpetrating fraud on the court runs contrary to the basic legal precepts just discussed. Moreover, the mere fact that counsel might settle a suit without the client's authorization does not establish fraud on the court so as to support vacating a final decision. See Senate Realty Corp. v. Commissioner, 511 F.2d 929 (2d Cir. 1975); Flood v. Commissioner, 468 F.2d 904 (9th Cir. 1972), affg. T.C. Memo. 1969-249.

More fundamentally, petitioners have not convinced us that Mr. Kauffman lacked authority to settle petitioners' cases. As the May 19, 2003, trial session approached, Mr. Gazi explored having Mr. Kell replace Mr. Kauffman as petitioners' counsel. The evidence clearly shows, however, that Mr. Kell declined to take petitioners' cases for a variety of reasons: Because no continuance had been granted (no written motion for a continuance having been filed), because Mr. Gazi had not paid him the requested $20,000 advance fee, and because Mr. Kell had lacked an opportunity to adequately assess the merits of petitioners' cases.

Moreover, on the basis of all the evidence, we do not believe that Mr. Gazi fired Mr. Kauffman until after the entry of the decisions in these cases.[11] The evidence shows that on May 15, 2003, Mr. Gazi faxed materials to Mr. Kauffman and Ms. Miller in support of a continuance; that at least through May 16, 2003, Mr. Gazi continued to have telephone conversations with Mr. Kauffman regarding petitioners' cases; and that in June 2003 (having ceased communications with Mr. Kell) Mr. Gazi met with Mr. Kauffman to discuss the cases.

Petitioners put great weight on various documents that Ms. Miller filed with the Court on May 13, 2003, which stated that Mr. Kauffman was no longer authorized to represent petitioners. We believe that Ms. Miller made these representations in good faith, advising the Court of the situation as she then understood it, on the basis of information that she had recently received (i.e., that the Gazis had retained Mr. Kell and fired Mr. Kauffman) but that would shortly prove to be incorrect. Far from supporting petitioners' allegations that Ms. Miller sought to perpetrate a fraud on the Court, these statements reinforce our perception that Ms. Miller's actions in these cases have been consistent with her responsibilities as an officer of this Court. Especially after the telephonic conference with the Court on May 14 and subsequent telephonic conferences between Mr. Kauffman and Mr. Gazi, one of which included Ms. Miller, it became apparent to all concerned that Mr. Kell had entered no appearance in these cases, that he was unlikely to do so before the May 19 trial session, and that Mr. Gazi continued to deal with Mr. Kauffman as petitioners' counsel. Thereafter, Ms. Miller acted reasonably, in good faith, and in accordance with Mr. Kauffman's presumptive authority as petitioners' counsel of record, in dealing with Mr. Kauffman as petitioners' authorized representative.

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[11] In fact, the record does not establish that Mr. Gazi would have had any authority to fire Mr. Kauffman as counsel of record for All Community Walk In Clinic.

Indeed, on brief, petitioners seem to acknowledge that, at least throughout the period immediately before the May 19, 2003, calendar call, Mr. Kauffman continued to represent petitioners. They contend, however, that his authority was limited to seeking a continuance on petitioners' behalf. But if that is so, the question arises: Exactly how did petitioners intend to proceed when their eleventh-hour requests for continuances, made informally in a telephonic conference on Wednesday, May 14, 2003, were not entertained by the Court? The cases were set for trial in Baltimore the next Monday. Insofar as the record reveals, petitioners had done little or nothing to ready these cases for trial. No trial memoranda had been filed on petitioners' behalf.[12] Deemed admissions appear to have resolved most of the income items against the Gazis. Pursuant to the Court's May 8, 2003, Order sanctioning petitioners for failing to respond to the Court's March 18, 1999, Order to Show Cause, petitioners were prohibited from introducing into evidence any testimony or documents that would have been responsive to respondent's discovery requests served on petitioners February 10, 1999. The local Baltimore counsel that Mr. Gazi had sought to retain refused to enter these cases. Unless petitioners took some action, they faced possible dismissal of their cases and entry of decisions against them, as stated in the Court's December 18, 2002, notices setting the cases for trial.

That potential outcome obviously would have been less attractive to petitioners than respondent's settlement

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[12] Pursuant to the Court's Standing Pre-Trial Orders, dated Dec. 18, 2002, unless a basis of settlement had been reached, each party was required to submit a trial memorandum to the Court no later than 15 days before the first day of the May 19, 2003, trial session. In their trial memoranda, the parties were required, among other things, to identify trial witnesses and provide a brief summary of their testimony. The Court's Standing Pre-Trial Order states: "Witnesses who are not identified will not be permitted to testify at the trial without leave of the Court upon sufficient showing of cause."

offer, which offered substantial concessions; specifically, a reduction in the Gazis' tax liability of about $800,000, including substitution of negligence penalties for the fraud penalty. Mr. Gazi had received this settlement offer on May 2, 2003. He had discussed it with Ms. Miller, Mr. Kauffman, and Mr. Kell. Both Mr. Kell and Mr. Kauffman had advised him of the benefits of accepting the settlement offer and later pursuing options to avoid paying the resulting tax liability. Especially in light of these various considerations, we find credible Mr. Kauffman's testimony that on May 15, 2003, Mr. Gazi authorized him to pursue settlement with Ms. Miller and a short time later authorized him to accept respondent's settlement offer.

Petitioners seem to suggest that someone, ostensibly Mr. Kauffman, misled Mr. Gazi into believing that the Court had granted a last-minute continuance of these cases, and that Mr. Kauffman and Ms. Miller then proceeded in bad faith to enter into a settlement agreement that they knew petitioners had not authorized and that was never disclosed to petitioners. We find petitioners' theory implausible in light of the evidence. It is true that Mr. Kell's contemporaneous notes indicate that on May 16, 2003, Mr. Gazi told Mr. Kell that there was a "continuance granted to 6/30/03".[13] According to these same notes, however, Mr. Kauffman and Ms. Miller "were also told to settle." Although it is unclear from these notes exactly who "told" Mr. Kauffman and Ms. Miller to settle, on the basis of all the evidence we believe it most likely was Mr. Gazi. The evidence clearly shows, contrary to petitioners' allegations, that Mr. Gazi expected Mr. Kauffman and Ms. Miller to settle the cases--a conclusion that is reinforced by the immediate cessation of communications between Mr. Gazi and Mr. Kell and the absence of any evidence that petitioners

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[13] June 30, 2003, was the deadline requested by the parties for submitting stipulated decisions in these cases. We surmise that the "continuance" referred to in Mr. Kell's notes relates to this deadline beyond the scheduled trial session.

were doing anything to prepare for the new trial date that Mr. Gazi supposedly believed was only a month away.

Petitioners do not now dispute that Mr. Kauffman traveled from Florida to Baltimore to visit Mr. Gazi and his son on June 15, 2003.[14] We find credible Mr. Kauffman's testimony that the purpose of this meeting, which lasted several hours, was to identify any computational issues with respondent's settlement offers and that, in fact, Mr. Kauffman subsequently relayed to Ms. Miller several computational problems that had been identified at this meeting. We do not find credible petitioners' suggestion that Mr. Gazi thought the purpose of this meeting was simply to discuss petitioners' case with Mr. Kauffman. It is hard to square petitioners' suggestion with their allegation that Mr. Kauffman was no longer authorized to represent them during this time. Moreover, if, as petitioners suggest, on June 15, 2003, Mr. Gazi was operating under the impression that the cases had been continued until June 30, 2003 (as Mr. Kell's notes indicate Mr. Gazi told him), it is telling that Mr. Gazi had not renewed his efforts to have Mr. Kell enter these cases (a continuance having been one of Mr. Kell's major preconditions) and, insofar as the record reveals, was doing nothing else to prepare these cases for the trials that he supposedly believed were upcoming in 2 weeks. On the basis of all the evidence, we are led to the conclusion that Mr. Gazi was doing nothing to prepare the cases for trial because he understood the cases were to be settled in accordance

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[14] In an affidavit attached to petitioners' memoranda in support of the motions for leave to file motions to vacate, Mr. Gazi averred that the meeting with Mr. Kauffman occurred in April 2003, before petitioners had received respondent's settlement offers. Petitioners appear to have abandoned this version of the facts. Petitioners' inconstancy with regard to this and other significant factual allegations undermines their credibility.

with the settlement offer that Mr. Kauffman had traveled to Baltimore to review with him.[15]

Conclusion

Petitioners have failed to establish specific facts demonstrating that Mr. Kauffman or Ms. Miller perpetrated any fraud on the Court. In particular, petitioners have failed to show that Mr. Kauffman lacked authority to consent to the entry of the decisions in these cases or that Ms. Miller, at the time the settlement agreement was reported to the Court or the stipulated decision documents were submitted, had reason to believe he lacked such authority. The mere fact that Ms. Miller previously had filed documents with the Court stating that Mr. Kauffman was no longer authorized to act on petitioners' behalf, does not suggest that Ms. Miller sought to perpetrate a fraud on the Court by entering into the settlement agreement. To the contrary, we believe that Ms. Miller acted reasonably and in good faith by bringing the issue to the Court's attention and discussing it with the Court, Mr. Kauffman, Mr. Kell, and Mr. Gazi. We find that by the time of the settlement agreement, Ms. Miller reasonably believed (as did the Court) that those issues had been satisfactorily clarified and resolved.

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[15] We are not insensitive to the fact that Mrs. Gazi was gravely ill during this time. Undoubtedly, Mr. Gazi was distracted and preoccupied with his wife's health. We do not believe, however, that this circumstance explains why Mr. Gazi would have been wholly inattentive to lining up new counsel, making trial preparations, or seeking further continuances, if he actually believed that the trials had been continued until June 30, 2003, as he told Mr. Kell. Indeed, Mr. Gazi had been keenly focused on petitioners' Tax Court cases at least since May 2, 2003, when he received respondent's settlement offers, through the period that culminated with his June 15, 2003, meeting with Mr. Kauffman in Baltimore. We do not find credible petitioners' suggestion, which is supported by no credible evidence, that Mr. Gazi had ceased to attend to these cases because he was under the impression that the trials had been continued until some indefinite future date.

Ultimately, it appears to us that Mr. Gazi, having authorized Mr. Kauffman to settle these cases, now wishes to repudiate the settlement agreement. It may well be that Mr. Gazi authorized the settlement agreement only to avoid the worse predicament of proceeding to trial not merely unprepared but also severely disadvantaged by deemed admissions and Court-ordered sanctions resulting from petitioners' repeated failures to comply with the Court's Rules and Orders. Nevertheless, such a circumstance affords no basis for setting aside this Court's final decisions in these cases. Accordingly,

Appropriate orders will be issued denying petitioners' motions for leave to file motions to vacate the final decisions of this Court.

UNITED STATES TAX COURT

WASHINGTON, DC 20217

ALL COMMUNITY WALK IN CLINIC Petitioner	)	Docket No. 7949-98
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

ORDER

Pursuant to the findings of the Court as determined in its Opinion, T.C. Memo. 2005-190, filed July 28, 2005, it is

ORDERED that petitioner's motion for leave to file motion to vacate final decision, filed March 12, 2004, is denied.

/s/
Michael B. Thornton Judge

Date: Washington, D.C.
July 28, 2005

UNITED STATES TAX COURT

WASHINGTON, DC 20217

MOHAMMED A. GAZI AND ESTATE OF RAEES I. GAZI, DECEASED, MOHAMMED A. GAZI, PERSONAL REPRESENTATIVE, Petitioners	)	Docket No. 7950-98
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

ORDER

Pursuant to the findings of the Court as determined in its Opinion, T.C. Memo. 2005-190, filed July 28, 2005, it is

ORDERED that petitioners' motion for leave to file motion to vacate final decision, filed March 12, 2004, is denied.

/s/
Michael B. Thornton Judge

Dated: Washington, D.C.
July 28, 2005